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April 12, 2004

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Cover Letter

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Dear Secretary of the Commission, the following is an original and four copies of an Application for Review directed at Edwards Communications (MM Docket No. 01-33; RM-10060) for a proposal to reallocate 221C3 to Cass City, MI.

Sincerely,

*Ed Czelada*

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )

Amendment of Section 73.202(b), )  
FM Table of Allotments, )  
FM Broadcast Stations. )

(Caro and Cass City, Michigan) )

MM Docket No. 01-33  
RM-10060

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Application For Review**

Edward Czelada ("Czelada") hereby files this Application For Review. In support thereof, the following is submitted:

**A. Background**

1. Before the full Commission is a proposal to amend the FM Table of Allotments in Section 73.202(b). The proposal involves a change of community of license that would provide a first local service at Cass City on channel 221C3 at the request of Edwards Communications, L.C., licensee of Station WIDL (FM) Caro, Michigan on channel 221A. The Commission asked for comments and counterproposals with a comment deadline of April 2, 2001 and a reply comment deadline of April 17, 2001. A counterproposal was timely filed by Czelada suggesting substitution of channel 297C3 instead of 221C3 at Cass City so that spectrum in the reserved portion of the FM band may be preserved for a new non-commercial FM to serve Ubly, MI on 218C3. On May 4, 2001 the Commission approved the Change of WIDL from 221A at Caro to 221C3 at Cass City stating it was in the "public interest" and that "no comments or counterproposals were received." After reviewing of the May 4, 2001 Report and Order that was silent on the Czelada counterproposal a fax was sent by Czelada with a "FCC date stamped" copy of the counterproposal to the attention of Mr. John Karousos. The FCC staff gave no direct response to the contact attempts by Czelada however on May 11, 2001 an Erratum was released stating that a footnote was "inadvertently omitted" and

that the counterproposal was "not considered" because it was "defective when filed" according to the Commission. On June 11 Czelada filed a Petition For Reconsideration sighting mainly 307(b) and due process concerns. On June 26 Edwards filed Opposition To Petition For Reconsideration. On July 10, 2001 Czelada filed Opposition To Opposition To Petition For Reconsideration. On March 12, 2004 the Assistant Chief of the Media Bureau released a MO&O denying the Petition For Reconsideration. The instant Application for Review is timely filed.

#### **B. Commission Errors**

2. The Commission's handling of this case has been less than professional. Their first error is, by their own admission <sup>1</sup>, they initially did not consider the comments filed by Czelada. On May 4, 2001 the Commission approved the Change of WIDL from 221A at Caro to 221C3 at Cass City stating it was in the "public interest" and that "no comments or counterproposals were received." The fact that they had to issue an erratum proves that the Commission did not initially consider Czelada's proposal <sup>2</sup>. Once the initial decision has been made, it requires substantially more effort to change the decision; rather than to make it fairly in the first place and consider all points of view. An attempt was made by Commission staff to "gloss over" the error by issuing a belated response in the form of an Erratum and stating that there was footnote "inadvertently omitted". This however, does not square with the facts in the May 4, 2001 Report and Order in which the Commission unequivocally stated, "No comments or counterproposals were received". It is obvious the Erratum was not intellectually correct considering the timing of the events.

3. The Commission's MO&O released on March 12, 2004 contained so many factual and typographical misrepresentations, it was nearly impossible to determine who they were finding in

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<sup>1</sup> MO&O at para. 3 "The erratum properly evaluated Edward's filing on the merits."

favor of. On at least three occasions they switched the names of the parties of interest making it extremely difficult to follow<sup>2</sup>. Orders written by the Commission can become a part of the Federal Register and become a part of history. The Commission is improperly rewriting history by issuing careless and unprofessional orders. In this order they also had to correct their previous errors of locating the reference coordinates of 221C3 at Cass City outside of the United States in their previous order and in the database. Additionally, the Commission failed to serve Czelada with courtesy copies of the ANY Commission's decisions involving this matter including R&O, Erratum and the most recent MO&O. We only found out about the MO&O weeks later by reading it on a third party website ( [www.AllAccess.com](http://www.AllAccess.com) ). We have not been able to find a public release of the MO&O in the daily FCC releases.

**C. 307(b) Analysis**

4. 307(b) of the US Civil Code states that: "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In the MO&O the Commission states: "...we cannot make allotments in the reserved band, as those channels are requested by application, and there is no exception to this rule when there is a freeze on."<sup>4</sup>. Strict interpretation of 307(b) requires "fair and efficient distribution" whether or not a freeze is in effect because the U.S. law would override any FCC policy or docket in conflict with 307(b) because there is "demand for the same". The allocation branch deals primarily with commercial

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<sup>2</sup> The Commission failed to acknowledge Czelada's counterproposal.

<sup>3</sup> MO&O twice in para. 2 and once in para. 3 ("Edwards" and "Czelada" names are switched).

FM frequencies but they must consider the potential preclusionary effects of such allocation on the reserved portion of the band especially in light of the freeze that currently exists with reserved portion of the band and the expression of interest for 218 C3 at Ubly that was provided in the counterproposal. We would have simply applied for channel 218C3<sup>5</sup> at Ubly, MI if the current freeze on new non-commercial stations was not in effect, since that option was not available. Czelada felt it was in the best interest of all parties to resolve the issue in the open proceeding to avoid forcing a later channel change to WIDL by a new rulemaking proceeding after construction had been completed on WIDL on 221C3 at Cass City. Additionally, section 303(g) of the Communications Act of 1934 also requires the Commission to: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." Consideration of 303(g) requires the "larger and more effective use of radio in the public interest" and cannot be ignored just because of the freeze on the reserved portion of the band. The FCC allocation departments' duty is to ascertain these issues as required under 307(h) and 330(g). Failure to do so renders the agency ineffective. In MM Docket 95-31 which instated a "temporary freeze"<sup>6</sup> upon the reserved portion of the band is silent on the scenario in this instant case, but it is obvious from the language in the Docket that the Commission was concerned with the potential preclusionary effects of a freeze on the reserved band and encouraged applicants to apply on a commercial channel if a preclusion takes place<sup>7</sup>. A potential win-win solution to this dilemma is to allocate 297C3 to Cass City, which

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<sup>4</sup> MO&O at para. 2

<sup>5</sup> Czelada is president of several NCE stations and is eligible to file these comments on behalf of the Non-Profit Corporations as is being done herein.

<sup>6</sup> The freeze is approaching half of a decade, and is certainly not a "temporary freeze". Had the Commission opened a NCE filing window in a timely fashion this problem could have been prevented.

<sup>7</sup> Excerpt from MM Docket 95-31: "The filing freeze is limited to reserved NCE channels. There is a similar freeze in place on non-reserved channels, while the Commission transitions to an auction environment for those channels. Should the staff lift the freeze on non-reserved channels prior to lifting the freeze on reserved channels, NCE applicants will have the option at that time to apply for non-reserved channels, subject to their participation in any auctions that may result consistent with the policies and regulations established herein."

would provide the same C3 class of allocation Edwards requested while not precluding the opportunity for 1st and 2nd and non-commercial service areas on channels 218, 219, and 220. Otherwise to be fair, the Commission must also place a freeze on major changes on "adjacent" and "LF." channels with respect to the reserved band.

**D. Allocation Options**

5. There are several options to resolve this matter in the better interest of both parties and for the general listening public. First of all, the Commission could have denied the request of Edwards to change city of license and channel due to a showing of interest for 218C3 at Ubly as a noncommercial station. The amount of increased population served by Edward's proposal would be substantially less than the new population covered by a new noncommercial station covered by 218C3 at Ubly. The Commission clearly favors new "first services" over the power increases of existing stations, which is the cornerstone of 307(b).

6. If the Commission indeed wanted to proceed with changing the city of license from Caro to Cass City as requested by the Edward's NPRM, they could have allotted several other channels class A channels and a C3 channel in Cass City which would still satisfy the request for 218C3 at Ubly. According to our engineering research, the Commission could have allocated 221A, 297A or 297C3 to Cass City or other frequency options. The fact that Czelada counter proposed 297C3 shows that he was interested in finding a solution in the best interests of all parties. The Commission doesn't require petitioners to find substitute channels in an NPRM as Czelada did in proposing 297C3, therefore their argument about his minor coordinate corrections<sup>8</sup> being untimely filed is irrelevant. The only fact that Czelada was required to show in his

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<sup>8</sup> The coordination correction was *de minimus* when compared to the Commission's own coordinate errors in the R&O.

counter proposal was that he was interested in 218C3 at Ubly on behalf of his noncommercial interests.

7. Since the noncommercial band is frozen, Czelada requested the allocation of 218C3 be reserved in the database with respect to Canada. There is precedence for this type of request. If the Commission is going to issue a freeze on the noncommercial band, they must also freeze major changes on channels that are adjacent to and affecting the 10.7 MHz of the reserved channels. By failing to do this, the Commission is affectively tying the hands of noncommercial broadcasters and denying their rights of due process.

**E. Conclusion**

8. We urge the full Commission to reconsider the use of 218C3 at Ubly, MI. It appears in this case that the Commission staff is bowing to pressures of commercial broadcasters and self interests to collect auction funds by shutting out any new noncommercial interests while the band is frozen. They are denying the rights of noncommercial broadcasters and failing to serve the public interest in this allocation case in violation of 307(b). Additionally, they are attempting to "save face" and "sweep" their gross procedural errors "under the rug". The Commission staff's handling of this matter can be considered sloppiness at best and at worst a baleful attempt to cover up their unprofessional conduct in this matter.

Respectfully Submitted,

By: Ed Czelada  
Edward Czelada\*

April 12, 2004

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Imlay City, MI 48444

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\*The above signed hereby verifies that this document and previous related pleadings, pursuant to §1.52 of the Commission's rules, is true and correct to the best of my knowledge and belief.

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<sup>9</sup> 206B at Bay City, MI is listed as an allocation in the FCC database with respect to Canada.



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**CERTIFICATE OF SERVICE**

I certify that on this 12th day of April 2004, I caused a copy of the foregoing petition to be mailed via first class postage prepaid mail to the following:

Edward Communications, L.C.  
C/O John S. Neely  
Miller and Miller, P.C.  
PO box 33003  
Washington, DC 20033

  
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Edward Czelada